

STATE OF MICHIGAN
COURT OF APPEALS

N.L. ANDERSON & SONS, INC., d/b/a NATE'S
MARKET,

Plaintiff-Appellant,

v

PETER A. BASILE SONS, INC.,

Defendant-Appellee.

UNPUBLISHED
September 9, 2003

No. 240502
Wayne Circuit Court
LC No. 00-030374-CK

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

MEMORANDUM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

Plaintiff filed a two-count complaint alleging breach of contract based on a third-party beneficiary theory and negligence. Plaintiff alleged that defendant entered into a construction contract with Grosse Ile Township for the reconstruction of Macomb Street. Although the contract provided that defendant's construction would minimally impact local traffic and businesses, plaintiff alleged that defendant breached these contractual provisions. Plaintiff further alleged that the contractual breach also supported a negligence theory. The trial court granted defendant's motion for summary disposition.

An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a claim as a third-party beneficiary, an objective standard is used to determine the plaintiff's status. *Schmalfeldt v North Pointe Ins Co*, 252 Mich App 556, 562; 652 NW2d 683 (2002). "The law presumes that a contract has been executed for the benefit of the contracting parties, and the mere fact that a third person would incidentally benefit does not give the third person a right to sue for the breach of contract." *Id.* (citations omitted). The contract itself establishes the parties' intentions. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 666; 593 NW2d 578 (1999).

An objective review of the contract at issue reveals that plaintiff was not an intended, direct beneficiary of the contract between defendant and the township. Rather, the language upon which plaintiff relies is merely a standard indemnification clause that was intended to provide benefits to the contracting parties. *Brunsell v City of Zeeland*, 467 Mich 293, 296-298;

651 NW2d 388 (2002). The public generally may not be considered an intended third-party beneficiary to a contract. *Id.* at 298. Thus, the contractual language addressing injuries to “any person” is too broad to acquire direct, third-party beneficiary status. The negligence claim also fails as a matter of law where plaintiff failed to allege a duty separate and distinct from the contractual obligation. *Sherman v Sea Ray Boats, Inc.*, 251 Mich App 41, 52; 649 NW2d 783 (2002). Additionally, duty presents a legal question for the court based on an assessment of competing policy considerations to determine whether the relationship between the parties will occasion a legal obligation to the injured party. *Krass, supra.* The competing policy considerations do not warrant a cause of action to business owners and patrons for lost profits and inconvenience caused by constructions projects.

Affirmed.

/s/ Peter D. O’Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood